

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	:	
On Its Own Motion	:	
	:	
Proceeding under Section 16-112(m)	:	01-0053
of the Public Utilities Act to	:	
determine whether to continue or	:	
terminate the neutral-fact-finder	:	
procedure.	:	

~~HEARING EXAMINER'S POST-EXCEPTIONS PROPOSED ORDER~~

DATED: April 25, 2001

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By the Commission:

**I. PROCEDURAL HISTORY AND APPLICABLE STATUTORY PROVISIONS**

On January 23, 2001, the Commission initiated this proceeding after considering a Report from the Staff of the Illinois Commerce Commission ("Staff") which recommended that the Commission assess whether the Commission should continue or terminate the Neutral Fact Finder ("NFF") process under Section 16-112(m) of the Public Utilities Act (the "Act"). (220 ILCS 5/16-112(m)) As discussed more fully below, the NFF is one of the two processes by which the market value of power energy sold by Illinois electric utilities collecting transition charges may be determined.

Section 16-108 of the Act authorizes electric utilities to impose transition charges from 1999 through at least 2006. Transition charges are to be set pursuant to a formula established in Section 16-102 of the Act. The market value of electricity is one component of that formula. Furthermore, electric utilities are required to make available to certain customers the Power Purchase Option ("PPO") based upon the same market value used in establishing transition charges. (220 ILCS 5/16-110)

Section 16-112 of the Act governs the determination of market value under electric utility tariffs. Those tariffs must either (1) provide "for a determination of the market value for electric power and energy as a function of an exchange traded or other market traded index, options or futures contract or contracts applicable to the market in which the utility sells, and the customers in its service area buy, electric power and energy," or (ii) reflect "the market values resulting from the neutral fact-finder process set forth in subsections (b) through (h) of this Section." 220 ILCS 5/16-112(a). The NFF process specifies that, each year, the NFF "shall calculate market values for the next year and, to the extent the summaries include a sufficient number of actual contracts to represent a viable market for the sale and delivery of electric power and energy in subsequent years, for each of the 4 succeeding years." 220 ILCS 5/16-112(d).

Section 16-112(b) of the Act requires the Commission to appoint an NFF by April 30 of each year, through 2007, except as provided in subsection (m). That subsection provides, in relevant part, as follows: "Provided, however, that if each electric utility serving at least 300,000 customers has placed into effect a tariff that provides for a determination of market value as a function of an exchange traded or other market traded index, options or futures contract or contracts, then the Commission can require any other electric utilities to file such a tariff, and can terminate the neutral fact-finder procedure for the periods covered by such tariffs." 220 ILCS 5/16-112(m).

In its Initiating Order, the Commission noted both that (1) only Commonwealth Edison Company ("ComEd"), Illinois Power Company ("IP") and Central Illinois Public Service Company ("AmerenCIPS") serve at least 300,000 customers, and (2) the proposed market value index tariffs (the "MVI tariffs") of ComEd, IP and AmerenCIPS (jointly, the "Utilities") are under consideration in Docket Nos. 00-0259, 00-0395 and 00-0461 (cons.) (the "MVI Proceeding"). The Commission recognized, hence, that one possible outcome of the MVI Proceeding is that "each electric utility that imposes transition charges [would place] into effect a tariff that provides for a determination of market value as a function of an index." (Initiating Order at 2)

Intervening petitions were filed by Central Illinois Public Service Company; Union Electric Company ("AmerenUE"); Commonwealth Edison Company; Illinois Power Company; Peoples Energy Services Corporation ("PE Services"); MidAmerican Energy Company ("MidAmerican"); the People of the State of Illinois (the "AG"); A. E. Staley Manufacturing Company, A. Finkl & Sons Co, Abbott Laboratories, Inc., Archer-Daniels-Midland Company, Cargill, Inc., Caterpillar, Inc., Continental General Tire Company, Corn Products International, Equistar Chemicals, L.P., Ethyl Corporation, Ford Motor Company, Granite City Steel Division of National Steel Corporation, Illinois Cement Company, LTV Steel Company, Modern Drop Forge Company, Monsanto Company, Motorola, Inc., Olin Corporation, Owens-Illinois, Inc., Solutia, Inc., and Spectrulite Consortium, Inc., as the Illinois Industrial Energy Consumers ("IIEC"); Mt. Carmel Public Utility Company and; Central Illinois Light Company. All petitions for leave to intervene were granted by the hearing examiner.

On February 15, 2001, a prehearing conference was held at the Commission's office at Springfield, Illinois, and a telephone hookup was made available at the Commission's offices in Chicago, Illinois. Appearances were entered by Staff; AmerenCIPS and AmerenUE (jointly, "Ameren"); MidAmerican; IP; ComEd; and PE Services. A procedural schedule was put in effect by the mutual agreement of the parties present. As a part of the agreed schedule, parties were given the opportunity to file comments and reply comments, and there was no objection by any party to the waiving of cross-examination, to the extent such right exists, with respect to any factual assertions contained in verified comments filed in this proceeding.

On February 23, 2001, the AG; Ameren; ComEd; PE Services; MidAmerican and; Staff filed initial comments in this proceeding. IP also filed verified initial comments on that day while IIEC filed initial comments and the affidavit of Robert R. Stephens.

On March 7, 2001, reply comments were filed by the AG, IIEC, Staff, ComEd, PE Services and IP. At a hearing on March 9, 2001, the record was marked "Heard and Taken."

A hearing examiner's proposed order was served on the parties. Exceptions thereto were filed by the AG, IIEC and Staff. ComEd and IP each indicated that they would not be filing exceptions to the proposed order. Replies to Exceptions were filed by Ameren, ComEd and Staff.

## **II. INITIAL COMMENTS**

### **A. ComEd's Position**

It is ComEd's position that if the Commission approves all three methodologies currently being litigated in Dockets 00-0259, 00-0395, 00-0461 (Consolidated), it may lawfully terminate the NFF procedure pursuant to Section 16-112(m) of the Act. ComEd recommends that the Commission terminate the NFF procedure because the utilities' MVI methodologies provide a mechanism for accurately determining market values and satisfy all of the requirements of Section 16-112. ComEd also asserts that the termination of the NFF process will neither harm ratepayers nor harm competition in the electric market in Illinois. (ComEd comments at 1)

According to ComEd, the interpretation of Sections 16-112(a) and 16-112(m) of the Act is an issue of first impression for the Commission and, as such, has not yet been examined by a court of competent jurisdiction. ComEd asserts that the Commission therefore has the ability to construe the statute, and the courts are likely to defer to the Commission's interpretation. (ComEd comments at 6, citing *Village of Buffalo v. Illinois Commerce Comm'n*, 180 Ill. App. 3d 591, 595, 129 Ill. Dec. 598 (1989)) Because of the Commission's substantial experience and knowledge regarding the issues within its jurisdiction, ComEd argues that its judgments constitute persuasive authority and courts are hesitant to reverse them. (*Id.*, citing *Milkowski v. Department of Labor*, 82 Ill. App. 3d 220, 37 Ill. Dec. 644 (1980)) ComEd claims that "interpretations by administrative agencies express an informed source for ascertaining the legislative intent." (*Id.*, citing *Adams v. Jewel Cos.*, 63 Ill. 2d 336, 344-45 (1976))

The proper interpretation of the Act, ComEd claims, must reflect both its plain language and the General Assembly's intent. (*Id.*, citing *Illinois Power Co. v. Mahin*, 72 Ill. 2d 189, 21 Ill. Dec. 144 (1978) and *In re Marriage of Logston*, 103 Ill. 2d 266, 82 Ill. Dec. 633 (1984))

ComEd contends that market based tariffs are to be preferred, and the NFF process may be terminated at the point it is no longer useful. According to ComEd, both

Section 16-112(a) and 16-112(m) state that a market-based tariff need only provide "for a determination of the market value" of power for each of the years specified in the NFF process. ComEd says these are the years 2000 through 2008. According to ComEd, the MVI methodologies proposed by ComEd, IP and Ameren satisfy the requirements of Section 16-112 because they provide for the determination of market value in each of those remaining years. ComEd contends that each utility's MVI methodology provides a method for which multi-year values could be determined pursuant to Section 16-112 if and when there is a sufficient amount of market data to represent a viable market for subsequent periods. The inclusion of specific multi-year values in the MVI tariffs, ComEd contends, is not required by Section 16-112. (ComEd comments at 6-7)

ComEd notes that the NFF has never produced multi-year, future market value data. ComEd asserts that there is currently insufficient data to calculate values for subsequent years. (ComEd comments at 7)

The advantage of market based methodologies, according to ComEd, is that they improve the accuracy of market values by using prices for forward contracts currently available and actual prices for recent transactions. ComEd contends that the data used in these methodologies are applicable to the utility's service area, are transparent, reflect seasonality and represent complete and up-to-date market information. ComEd claims that its MVI methodology, which was allowed into effect by an Interim Order of the Commission in April of 2000, has produced higher and more accurate market values and lower transition charges than the NFF process. In contrast, ComEd argues that the NFF process utilizes stale contracts, is an indeterminate "black box" that does not disclose to market participants how the market value is determined, and does not reflect seasonality and differences in peak and off-peak pricing. ComEd claims that more importantly, the NFF values have been wildly inaccurate on a seasonal basis, discouraging customers from switching to Retail Electric Suppliers ("RESs") during summer months and encouraging gaming by RESs in the nonsummer months. (ComEd comments at 7-8)

According to ComEd, the result of the NFF process was an obstacle to the "efficient and effective" competition intended by the Restructuring Law. ComEd asserts that the MVI methodologies work better for consumers and competition. (ComEd comments at 8) ComEd concludes that because the three methodologies proposed by the utilities satisfy Section 16-112(a), the Commission has the authority to terminate the NFF process pursuant to Section 16-112(m) when it approves those methodologies and the applicable tariffs are placed into effect.

## **B. IP's Position**

IP states that the Commission will likely issue a final order in the MVI Proceeding well before the end of April 2001. According to IP, shortly thereafter, the Commission will also know whether the three utilities are willing to accept any modifications to the MVI proposals that the Commission decides are necessary. IP says that assuming all three utilities agree to proceed with MVI alternatives (as modified), then, under Section

16-112(m), the question becomes: "Has every Illinois electric utility serving at least 300,000 customers placed into effect MVI replacements to the NFF?" IP claims the answer would be affirmative in that the only three Illinois electric utilities serving at least 300,000 customers are ComEd, IP, and AmerenCIPS. (IP comments at 2)

IP also asserts that the NFF process itself requires a substantial outlay of resources by all parties, those being the Commission, its Staff, the reporting entities and the NFF itself. IP claims that termination of that process would permit those resources to be employed elsewhere. IP indicates that it does not object to the Commission entering an order suspending the NFF process assuming ComEd, Ameren and IP accept the modified MVI tariffs that are the by-product of the final order in the consolidated MVI cases. Under such a circumstance, IP claims the statute provides the Commission with the authority to eliminate the NFF process altogether. Given the resource drain caused by the NFF process, IP says it does not believe that process should be continued absent a compelling reason to do so. IP states that should one or more utilities reject the revised MVIs, the Commission would need to continue with the NFF process until a suitable replacement was approved and adopted. (IP comments at 2-3)

IP says there is a "remote" possibility that a future NFF could do what neither the past NFFs have done nor what any MVI proposal has been able to do: quote prices for more than the next calendar year. IP suggests that rather than devote substantial resources to such a remote possibility, the Commission should consider an abbreviated, and much less expensive and time-consuming, process under which it has the NFF take a quick look at a representative sampling of data to see whether anything has changed such that multi-year values are likely. IP states that if multi-year tariffs are not likely, then the NFF process would be suspended for another year but, if they are likely, then a full blown NFF process could be employed to set those values. (IP comments at 2-3)

### **C. Ameren's Position**

Ameren recommends that the Commission terminate the NFF procedure in the event that the Commission approves, and the utilities file, MVI tariffs. The termination of the NFF in such circumstances, Ameren contends, would satisfy the requirements of Section 16-112(m) of the Act and, further, would rid the Commission and Illinois electric service providers of a cumbersome, costly and largely valueless exercise. (Ameren comments at 2)

Ameren asserts that the NFF procedure has been both frustrating and ineffective. According to Ameren, the process involves the reporting of thousands of contracts annually, with no particular contribution to the accuracy of the projections of market value proportionate to the effort involved. Ameren argues that this reporting, at a great burden to the reporting entities and at a great cost to the Commission, simply has not produced results that have spurred competition in Illinois. (Ameren comments at 3)

Ameren contends that if the Commission approves the MVI tariffs in the MVI Proceeding and the utilities agree to file those tariffs, the Commission could properly exercise its authority under Section 16-112(m) to cancel the NFF procedure. In this circumstance, Ameren asserts that each electric utility serving at least 300,000 customers will have placed into effect a market value tariff, and the Commission may terminate the NFF procedure for the periods covered by such tariffs. (Ameren comments at 3)

Ameren alleges that the MVI tariffs will cover all periods for which the NFF would make market value determinations. Ameren claims the MVI tariffs are formulaic and as the Act requires, they determine market value as "a function of an exchange traded or other market traded index, options or futures contract or contracts applicable to the market in which the utility sells, and the customers in its service area buy, electric power and energy." Ameren asserts that the MVI tariffs will cover all future periods; that the same formulas will continue to apply; and that the specific results will become known as the relevant variables become known. (Ameren comments at 3)

Ameren states that in addition to determining market values for the following year, the NFF is directed to determine market values "to the extent the summaries include a sufficient number of actual contracts to represent a viable market for the sale and delivery of electric power and energy in subsequent years, for each of the 4 succeeding years." According to Ameren, the NFF has been unable to do so. In the NFF Revised Report for 2000, Ameren states that the NFF noted its obligation to calculate market values for each of the succeeding four years to the extent the contract summaries include a sufficient number of actual contracts to represent a viable market in those years. Ameren says the NFF reported, however, that:

"A large majority of the contracts utilized to calculate market values for the year 2001 are retail contracts that terminate by the end of the year 2001. Less than 8% of the contract summaries submitted were for contracts that extended through the end of 2002. Some of these contract summaries include proxy prices based on actual costs from the preceding year as required by the Act. The Act does not require and it would be inappropriate to utilize actual costs from the preceding year for the years beyond 2001"

Ameren says the Report concluded that, "once the cost based and the terminated contracts were removed from the population, there were not sufficient contracts to represent a viable market in the years beyond 2001." Ameren states that market values were not included in the Report for years beyond 2001. (Ameren comments at 3-4)

According to Ameren, it may be argued that, if the MVI tariffs are adopted with "sunset provisions" causing them to expire at the end of 2003, the MVI tariffs would not cover all the periods that the NFF would address (even if the NFF is unable to make a determination for those future periods). Ameren believes that the proper view of any such sunset provision would be that the Commission's expectation reasonably would be



that the same or similar tariff would go into effect upon expiration of the initially-approved MVI tariff, and, if a utility did not make a timely filing in advance of such expiration date, the Commission could reinstate the NFF procedure. Ameren says, for example, if AmerenCIPS did not file a new MVI tariff by April 30, 2003, the Commission could reinstate the NFF for calendar year 2004. Ameren concludes that there is no need to keep the NFF in effect for years beyond the next year, especially given that the NFF has been unable to produce values for such years. (Ameren comments at 4)

#### **D. IIEC's Position**

IIEC contends that when read together, the provisions of Section 16-112 provide customers with the option to enter into multi-year transition charge contracts, provided multi-year market values have been established under the market index tariffs filed by the utility or under the NFF process. IIEC claims that in order for that option to have any meaning, it is necessary that a process be established for the determination of market value for each of the years specified in subparagraphs (b) through (h) of Section 16-112. According to IIEC, the market based index approaches put forward by ComEd and IP do not calculate or establish or determine a market value for each year specified in subparagraphs (b) through (h) of Section 16-112. (IIEC comments at 3, citing Affidavit of Robert R. Stephens) In IIEC's view, the NFF procedure offers the only opportunity for the determination of market values for each of the years between now and January 1, 2007. In the absence of a market based index tariff which establishes market values for each of those years, IIEC claims the NFF process offers customers the only opportunity to exercise the option granted to them by the General Assembly under Section 16-112(n).

IIEC also argues that as a matter of law, the Commission cannot terminate the NFF process under circumstances in which the market based index fails to establish market values for each of the years specified in subparagraphs (b) through (h) of Section 16-112. According to IIEC, interpreting Section 16-112(m) so as to permit the termination of the NFF process under these circumstances would render Section 16-112(n) meaningless. IIEC asserts that because the Commission cannot force modifications of the market based index tariffs on the utilities under Section 16-112(m), for all practical purposes, customers would most likely never have the opportunity to exercise the option granted to them under Section 16-112(n), because there would be no determination of market value and no possibility of a determination of market value for each of the years specified in subparagraphs (b) through (h) of Section 16-112. IIEC argues that an interpretation of one part of a statute in a manner which renders another part of the statute meaningless, is prohibited. (IIEC comments at 4, citing *Illinois Bell Telephone Co. v. Illinois Commerce Commission*, 283 Ill.App.3d 188, 669 N.E.2d 919, 933 (2nd Dist. 1996))

According to IIEC, the market values established under Section 16-112 are used to establish the "price" of the power purchase option granted to customers under the terms and conditions of Section 16-110 of the Act. IIEC says utilities are required to offer, as a tariff service or services, the right for a customer to purchase electric power

and energy from the electric utility at a price equal to the sum of the market value established under Section 16-112 and used to calculate the customer's transition charge, plus a fee for administrative costs. IIEC asserts that this Section of the Act contemplates that contracts for such service may extend for more than one year. (IIEC comments at 4-5, citing Section 16-110(b) which requires a " . . . 90 days notice for a purchase of more than one year's duration") In the absence of market index tariffs which establish the values for multiple years, IIEC claims that the NFF process offers the only opportunity for customers to have market values established for multiple year PPO contracts. It is the position of IIEC that the General Assembly contemplated the continuation of the NFF process under such circumstances and that elimination of the NFF process would eliminate the possibility of multiple year contracts under Section 16-110. (IIEC comments at 5)

The Commission, IIEC avers, should consider the possibility that the NFF process should remain in effect not only to determine market values for multiple year periods, but to ensure that process continues to be a viable alternative to the market based index approach. IIEC notes that a sunset provision has been proposed in the MVI Proceeding and suggests that depending upon the length of the sunset, it will be necessary to have the NFF process in place to provide a viable alternative to the market based index tariffs in the event they are not reapproved by the Commission. IIEC argues that absent a perfect coincidence, it is unlikely that the Commission would be able to hire a neutral-fact-finder and allow him to make the appropriate calculations of market value in a fashion that would allow the NFF market value to match the end of the market based index market values. IIEC claims this is so because the Commission must hire an NFF by April 30 of each year. (IIEC comments at 5-6, citing 220 ILCS 5/16-112(b)) IIEC further notes that the NFF must make its calculation by July 30 of each year (citing 220 ILCS 5/16-112(h)), and the market value as determined by the NFF takes effect on January 1 of the following year.

IIEC contends that there are customers who would like to have the option for a multi-year transition charge contract and the possibility of a multi-year PPO contract. (IIEC comments at 6, citing Affidavit of Robert R. Stephens) In order for these customers to continue to have the options and possibilities granted to them by the General Assembly, IIEC argues that it is necessary for the NFF process to continue so that there is a mechanism available for determining market values in each of the remaining years of the transition period which ends on December 31, 2006.

IIEC disagrees with the suggestion that the market based index tariffs filed by the utilities will, all else being equal, be applicable for each of the years remaining in the transition period, and, therefore, the requirements of Section 16-112 have been met and there is no need to continue the NFF process. IIEC contends that the tariffs in question do not determine a separate market value for each year of the remaining years of the transition period. (IIEC comments at 6, citing Affidavit of Robert R. Stephens) According to IIEC, because they do not do so, it is necessary, at a minimum, that the NFF process continue in order to provide a mechanism for determining those market values. Under Section 16-112(m) of the Act, IIEC argues that the Commission can only

terminate the NFF procedure for periods covered by the market based index tariffs. IIEC claims that since the tariffs do not cover the pertinent period, the Commission cannot terminate the NFF process. (IIEC comments at 6-7)

#### **E. MidAmerican's Position**

MidAmerican believes that the NFF process should be terminated for the time periods that Market Value Index tariffs are in place, as allowed under Section 16-112(m). MidAmerican claims that the NFF process requires both utilities and suppliers to expend large amounts of resources. MidAmerican does not believe spending these resources to complete the required NFF contract summary filing is justified if the results will not be utilized. (MidAmerican comments at 1)

MidAmerican states that although Section 16-112(d) contemplates that the NFF may calculate market values beyond the next year, there does not appear to be any requirement to do so. MidAmerican argues that it would therefore not appear reasonable to keep the NFF process in place to provide market values for future years. Given that the NFF process may not be useful in providing market values for future years, MidAmerican believes that if, as proposed in the hearing examiner's proposed order in Docket Nos. 00-0259, 00-0395, 00-0461, Consolidated, the approved market value tariffs for ComEd, Illinois Power and Ameren will be in effect for the entire years 2002-2003, then it would be appropriate for the Commission to terminate the NFF process for those two years. MidAmerican indicates that this would mean no contract summary filings would be required as of June 1, 2001 and June 1, 2002. (MidAmerican comments at 1-2)

MidAmerican states that if, as proposed in the hearing examiner's proposed order in Docket Nos. 00-0259, 00-0395, 00-0461, Consolidated, the market value tariffs would not be in effect beyond the end of the May billing period in 2004, absent some Commission action, the NFF process would need to be resumed for 2004 and after. MidAmerican indicates that this would require contract summary filings to occur again as of June 1, 2003. MidAmerican is concerned that the filing of replacement tariffs by the utilities on January 1, 2003 will not allow sufficient time for a Commission decision on those tariffs that would avert reinstitution of the NFF. MidAmerican believes that April 30, 2003 would be the latest reasonable date a decision could be entered that would ensure that parties were not compelled to begin work on their contract summary filings, in case such filings would ultimately be required. (MidAmerican comments at 2)

MidAmerican requests the Commission to issue an order terminating the Neutral Fact Finding process if Market Value Index tariffs are in place. In the event that the Commission decides not to terminate the NFF in this docket, MidAmerican suggests the Commission consider initiating a new docket to investigate terminating the NFF filing in 2002. (MidAmerican comments at 3)

## **F. The AG's Position**

It is the AG's position that even if the Commission issues an order approving all three of the utilities' Section 16-112(m) market index tariff changes, the Commission should not discontinue the NFF process. The AG reports that under Section 16-112(m), the Commission has the authority to propose modifications to the utility's market index tariffs; however, the Commission cannot require the utility to implement those modifications. The AG says that the Commission may only accept the utility's proposed tariff, without modification, or require the utility to continue using or reinstate the NFF. The AG states that the Commission must not only wait until it approves a market index process for the utilities' market value tariffs, but also must wait for each of the utilities to accept and implement any modifications to their proposals prior to discontinuing the NFF process. (AG comments at 2)

The AG recommends that the Commission consider retaining the NFF, regardless of whether it approves or the utilities accept a market index tariff. Under Section 16-112(m), the AG claims that the NFF is the default methodology of determining the market value for customer transition charges and the power purchase option. In the event that the Commission imposes a sunset provision on its approval, as proposed in the MVI Proceeding, the AG says the Commission will again have a choice between the utilities' tariffs and the NFF. The AG concludes that the Commission should not terminate the NFF, because such action would be premature and may unnecessarily limit or complicate the Commission's options upon a sunset approval of the utilities' tariff proposals. (AG comments at 2-3)

## **G. PE Services' Position**

PE Services claims that this proceeding is unique in that the Commission is neither being asked to weigh parties' evidence nor interpret a statute or rule. PE Services contends that the Commission must decide whether to continue or terminate the NFF procedure – either option statutorily within its purview. PE Services urges the Commission to continue the NFF procedure because it is in the best interest of the Commission, Illinois electric consumers and the electric market. (PE Services comments at 1)

According to PE Services, the threshold assumption for this proceeding is based on three results of the MVI Proceeding: first, the Commission must issue a final order sometime prior to April 30, 2001; second, the order must require that ComEd, Ameren and IP each notify the Commission whether each agrees to adopt their individually tailored MVI tariffs; third, each must be required to make an irrevocable affirmative commitment to adopt its respective MVI tariff prior to April 30, 2001. Unless all three of these conditions are met, PE Services asserts that the issue in this proceeding is moot because the NFF market value will remain statutorily required under Section 16-112(b). (PE Services comments at 2)

PE Services says that assuming the above-mentioned three conditions are met, and ComEd, Ameren and IP all adopt their respective MVI tariffs prior to April 30, 2001, the Commission has a policy decision to make. PE Services claims that the Commission must decide if it should require the NFF process to continue as insurance or a fallback position or if it should eliminate the “admittedly costly and burdensome” NFF process. PE Services argues that the uncertainty of the infant Illinois delivery service market, problems with the “de-regulated” electric market in other jurisdictions such as California and the language of Section 16-112(m) allow only one appropriate result. In the view of PE Services, the NFF process must remain, at least for the current period. (PE Services comments at 2-3)

According to PE Services, since neither the Commission, RESs, utilities nor customers know now whether the MVI tariffs being considered will meet their goal of approximating market value, elimination of the NFF process is premature. PE Services claims that the NFF process must remain in place, and the Commission must appoint a NFF this year to have a NFF-based market value available for calendar year 2002. Appointing a NFF, PE Services concludes, is a necessary insurance policy in case problems arise as a result of any or all of ComEd, Ameren or IP adopting an MVI tariff. (PE Services comments at 3)

#### **H. Staff’s Position**

Staff states that even assuming that the Commission issues an order directing the utilities to implement a market index alternative, the Commission could still not terminate the NFF process unless certain conditions are met. Staff reports that the Commission has the authority to propose modifications to the utility’s proposed market value index methodology, but utilities may reject the Commission’s modifications and rely instead on the NFF market values for purposes of computing transition charges. Staff asserts that two conditions must be fulfilled before the Commission can consider whether to terminate the NFF. First, the Commission must issue an order in the MVI Proceeding directing the utilities to implement an alternative market value index methodology, and second, ComEd, Ameren, and IP must accept the Commission’s modifications to their proposed tariffs, and implement said tariffs incorporating a market value index methodology. (Staff comments at 3)

### **III. REPLY COMMENTS; EXCEPTIONS AND REPLIES**

#### **A. ComEd’s Position**

According to ComEd, the AG makes two arguments in support of maintaining the NFF process. First, ComEd says the AG argues that under Section 16-112(m), the NFF process must remain in place until each of the utilities accept and implement any modifications to their proposals. ComEd agrees with the AG’s interpretation. However, ComEd asserts that Staff has anticipated this problem by suggesting in its Brief on Exceptions in the MVI Proceeding that the utilities indicate, no later than seven days following the entry of the Commission’s order, whether or not they accept the

modifications stated in the order. ComEd reports that none of the utilities objected to this condition. ComEd claims that if the utilities respond in a timely fashion as they have agreed to do, there will be no need to appoint a NFF. (ComEd reply comments at 2)

According to ComEd, the AG also recommends that the Commission consider retaining the NFF so that it remains an option after the sunset period on the MVI tariffs has expired. ComEd agrees with the AG that if the MVI methodology is not renewed, there could be another NFF. ComEd contends, however, that this is not a reason to maintain the "expensive and cumbersome" NFF process in the interim. ComEd asserts the more appropriate avenue would be for the Commission to terminate or suspend the NFF process for those years for which the MVI tariffs were approved and reinstate the NFF procedure if a new MVI tariff was not approved. (ComEd reply comments at 2-3)

ComEd states that PE Services asserts that this proceeding is "unique" in that the Commission is "neither being asked to weigh parties' evidence nor interpret a statute or rule." ComEd claims this is incorrect. The purpose of this proceeding, in ComEd's view, is to determine whether the Commission has the authority pursuant to Section 16-112(m) to terminate the NFF process. Whether or not the Commission has such authority is a question of statutory interpretation, according to ComEd. It is ComEd's position that the Commission does have the authority to terminate the NFF process. (ComEd reply comments at 3)

ComEd says PE Services also argues that the NFF should be continued as an "insurance policy" to guard against "[t]he uncertainty of the infant Illinois delivery service market" and "problems with the 'de-regulated' electric market in other jurisdictions such as California." ComEd claims that Section 16-112 does not contemplate having both methodologies in place simultaneously. If ComEd, IP and Ameren adopt their respective MVI tariffs prior to April 30, 2001, ComEd argues that there is no reason to have a NFF. (ComEd reply comments at 3)

ComEd also claims there is no policy reason to maintain the NFF. ComEd asserts that it is hard to understand how continuance of the NFF process would provide any benefit. ComEd repeats Ameren's assertion that the NFF process is "a cumbersome, costly and largely valueless exercise" that "has been both frustrating and ineffective." (ComEd reply comments at 3, citing Ameren comments at 2) ComEd contends that the MVI methodologies improve the accuracy of market values by using prices for forward contracts currently available and actual prices for recent transactions. ComEd's claims that its MVI methodology, which was allowed into effect by the Commission in April of 2000, has produced higher and more accurate market values and lower transition charges than the NFF process. ComEd asserts that the MVI methodologies are better than the NFF process for consumers and suppliers alike. (ComEd reply comments at 3-4)

According to ComEd, IIEC argues that the Commission cannot terminate the NFF process because (1) the NFF must stay in place now to remain an alternative to

the MVI approach after the sunset period and (2) the utilities' MVI tariffs do not provide multi-year values. ComEd's response to the first argument has been stated above.

As for the second argument, ComEd claims that there is no requirement in Section 16-112 that the MVI tariffs provide multi-year values. ComEd says that Section 16-112(a) states that a valid tariff is one that "provides for a determination of the market value" of power for each of the years specified. These, ComEd asserts, are the individual years 2000 to 2008. According to ComEd, the MVI tariffs in fact provide values for each of these years. (ComEd reply comments at 4)

ComEd says the NFF is only required to publish numbers for the individual year for which he or she is appointed. ComEd claims the NFF can publish numbers for a greater period, but is not required to do so. ComEd states that the NFF has chosen not to do so in the past. (ComEd reply comments at 5)

According to ComEd, the inclusion of specific multi-year values in the methodology is not required by Section 16-112. If multi-year values were necessary, ComEd claims that the legislature would no doubt have stated that valid tariffs must "include the market values" or "specify the market values" of power for the relevant period. ComEd says that instead, it compelled each utility filing a tariff to propose a mechanism and formula for establishing the market value of power annually. ComEd asserts that the legislature recognized that future market value data cannot be predicted with any reasonable degree of certainty. As a result, ComEd claims, the tariffs required by this section retain the flexibility necessary to ensure that transition charges accurately reflect the occasionally volatile prices in the energy industry. (ComEd reply comments at 5)

ComEd argues that not only is the language of the Act clear, past interpretations of Section 16-112 by the Commission in implementing the NFF process also confirm that multi-year data is not required. (ComEd reply comments at 5, citing 2000 Neutral Fact-Finder's Calculation of Market Values for Electric Power and Energy for the State of Illinois (Aug. 15, 2000) (Revised Final); 1999 Neutral Fact-Finder's Calculation of Market Values for Electric Power and Energy for the State of Illinois (June 7, 1999)) ComEd reiterates that the NFF has never produced multi-year, future market value data. ComEd claims the NFF has calculated values based upon market data each year and that this is identical to the practice proposed in the MVI tariffs. (ComEd reply comments at 5)

ComEd also argues that courts are likely to defer to such consistent application of a statute by an administrative agency, as reflecting the agency's interpretation of the law. (ComEd reply comments at 5-6, citing *Illinois Consolidated Telephone Co. v. Illinois Commerce Comm'n*, 447 N.E.2d 295, 300 (Ill. 1983); *Radio Relay Corp. v. Illinois Commerce Comm'n*, 370 N.E.2d 528 (Ill. 1977)) ComEd concludes that there is no support in the statute for imposing a requirement that a tariff supply more information than the NFF presently does.

## **B. IP's Position**

IP responds to what it refers to as IIEC's argument that the NFF process cannot legally be terminated because of the possibility of multi-year market values being published. IP claims this ignores the fact that to-date no NFF has been able to publish such values. Rather than continue the NFF process on the unlikely possibility that future NFFs will be able to do so, IP says it proposed a suspension of the process for current years along with a quick check to see if there was any real likelihood of multi-year values being determinable. IP believes that is a preferable process. (IP reply comments at 1-2)

IP states that PE Services and the AG's concerns go more to the possibility that one of the current MVI tariffs could be rejected by a utility. IP agrees that, in such a case, the NFF would need to be continued. According to IP, the assumption must be that we will know that outcome soon and therefore should plan for the possibility that the MVI tariffs are placed into effect in all three cases. In that instance, IP asserts the Commission does not need an ongoing "insurance policy" as PE Services calls it. IP argues that even if an MVI sunset provision is adopted, there is no reason to continue with the NFF during the interim because the NFF would add no value during that period. Thereafter, during the course of new MVI proceedings, IP claims that the Commission could easily adopt a schedule in the new MVI case(s) that meets the statutory needs of retaining a new NFF on a timely basis. In IP's view, the concerns expressed by the AG and PE Services counsel more for a lengthy sunset provision (assuming any is adopted at all) rather than a continuation of the NFF process throughout the period during which the MVI tariffs are in effect. According to IP, the premium to be paid for PE Services' "insurance policy" is simply not worth the modest protection provided by the publication of values that will not be used by anyone in the interim. (IP reply comments at 2)

## **C. IIEC's Position; IIEC's Exceptions and Replies Thereto**

IIEC agrees with the Staff's suggestion that before the Commission can eliminate the NFF under any circumstance, it must at least issue an order in the market value index dockets implementing the market based index methodology and any modifications the Commission recommends to the proposed tariffs therein. IIEC also agrees that ComEd, Ameren and IP must accept the Commission's modifications, to the extent any are made, and implement the tariffs incorporating the market based index methodologies as modified by the Commission. It is IIEC's position that even if these steps are accomplished, the NFF process cannot be terminated because it will still be necessary, under current circumstances, to have the NFF process in place pursuant to Section 16-112 of the Act. (IIEC reply comments at 1)

IIEC also agrees with the AG that the NFF process should not be eliminated regardless of whether the Commission ultimately approves and the utilities ultimately accept a market value index tariff, because the NFF is the default methodology for determining market value and needs to remain in place in order to provide a viable alternative to the MVI approach (assuming the Commission adopts such an approach).



IIEC agrees with the AG that it would be a wise decision to retain the NFF in the event the Commission incorporates a sunset provision into the MVI proposals. (IIEC reply comments at 2)

According to IIEC, Ameren implies that the NFF procedure should be eliminated because it is frustrating and ineffective. It is IIEC's position that the Commission does not have the authority to ignore the requirements of Section 16-112 for the reason that the procedures described therein are allegedly "frustrating and ineffective". (IIEC reply comments at 2)

IIEC claims that even under Ameren's "erroneous" interpretation of Section 16-112, the Commission is only allowed to terminate the NFF procedure for the "periods covered by the market value index tariff filed by the utility." IIEC states that the market value index tariffs failed to establish a market value for each of the years set forth in subparagraphs (b) through (h) of Section 16-112 (2000-2008). IIEC concludes that even under Ameren's "erroneous" interpretation of the law, the NFF process cannot be discontinued. (IIEC reply comments at 2)

According to IIEC, Ameren argues that because its tariffs will "cover all periods" for which the NFF would make a determination, the requirements of Section 16-112 have been met. IIEC says that Ameren misses the point. IIEC contends that if the market index tariff does not establish market values for each of the years specified in the NFF process, then a tariff incorporating the market values resulting from the NFF process must be adopted. (IIEC reply comments at 3, citing 220 ILCS 5/16-112(a)(ii)) The plain reading of the statutory language, IIEC argues, makes clear the tariffs must establish market values for each of the years specified in subparagraph (b) through (h) in order to comply with Section 16-112(a)(ii), not simply "cover all periods" for which the NFF would have made its calculations. (IIEC reply comments at 3)

IIEC claims that the NFF process must remain in place to give customers the opportunity to exercise the option, which it says utilities must grant, under Section 16-112(n), to have transition charge contracts for multiple years. The MVI tariffs do not establish such values; thus, IIEC contends, the legislature necessarily directed the NFF process remain in place. IIEC says that if there is no NFF process, then the language of the statute which contemplates a tariff incorporating the NFF values will be used to establish market values for each of the years specified in subsections (b) through (h) of Section 16-112 would be meaningless. According to IIEC, application or interpretation of one part of the statute so as to render another part meaningless is prohibited under rules of statutory construction. (IIEC reply comments at 3, citing *Park Superintendents' Professional Assn. v. Ryan*, 2001 Ill.App. Lexis 68, 18 (1st Dist., Feb. 21, 2001) citing *Henrich v. Libertyville High School*, 186 Ill.2d 381, 394, 712 N.E.2d 298 (Ill. 1998))

According to IIEC, Ameren notes that the NFF reported that less than 8% of the contract summaries "submitted" were for contracts that extended beyond 2000. IIEC says that there were 5953 contracts "submitted". However, IIEC asserts that the correct measurement of the significance of longer term contracts is based upon the total

contracts actually used by the NFF (2624) in comparison to the longer term contracts that the NFF actually relied upon to determine market value for 2001. (IIEC reply comments at 3, citing NFF Report at 9) IIEC claims that the NFF reported that of the 2624 contracts actually utilized by the NFF, approximately 87% were for a term of between one and five or more years  $((1771 + 463 + 56) \div 2624 = 87.3\%)$ . IIEC says that approximately 20% of the contracts used were for terms of three to over five years  $((463 + 56) \div 2624 = 19.8\%)$  and that over 67% of the contracts used were for terms of between one and three years  $(1771 \div 2624 = 67.5\%)$ . (*Id.*, citing NFF Report at 9). The fact that the NFF did not make calculations for each of the years contained in subparagraphs (b) through (h) of Section 16-112 last year, IIEC argues, does not mean that such calculation cannot be made or will not be made this year or in future years.

IIEC says that ComEd takes two primary positions in its comments. The first is that Section 16-112(m) allows the Commission to terminate the NFF process. Second, competition and ratepayers will benefit from termination of the NFF. (IIEC reply comments at 4)

With regard to the first position, IIEC says ComEd reasons that Section 16-112(a) and 16-112(m) "state that a market-based tariff need only provide 'for a determination of the market value' of power for each of the years specified in the NFF process". (*Id.*, citing ComEd comments at 6-7) According to IIEC, ComEd further opines that because the market value index tariffs it and other utilities have proposed provide for the determination of market value in the subject years, and provide a "method" which could determine multi-year market values in the future, those tariffs satisfy Section 16-112(a) and, therefore, the NFF process can be terminated under Section 16-112(m). (IIEC reply comments at 4)

In IIEC's view, ComEd's position is inconsistent with the plain language of Section 16-112(a)(ii). IIEC says a careful reading of ComEd's comments discloses that it uses the words "provide" or "provide for" or "provide a means for determining" throughout its discussion. IIEC asserts that this use of the word "provide" illustrates the flaw in ComEd's position. IIEC claims the word "provide" means "to get ready before hand"; or "to prepare (for or against) some probable or possible situation, occurrence, condition, etc. ...". (IIEC reply comments at 4-5, citing Webster's New World Dictionary of American Language, College Edition, 1966) According to IIEC, Section 16-112(a)(ii) does not use the word "provide" or the phrase "provide for" in reference to the market values for each of the years described in the NFF process (2000-2008). IIEC says it uses the word "establish" which means "to set up permanently" or "to set up (a government, nation, or business, etc.); . . . ." (*Id.*, citing Webster's New World Dictionary of American Language, College Edition, 1966).

It is the position of IIEC that when the legislature used the words: ". . . (ii) in the event such tariff does not establish market values for each of the years specified in the neutral-fact-finder process . . . ." in the context of Section 16-112(a)(ii), it meant that if the tariff did not "set up" a market value for each of the subject years, then certain actions would be taken. IIEC says that the actions to be taken would be the

establishment of a ". . . tariff incorporating the market values resulting from the neutral-fact-finder process set forth in subsections (b) through (h) . . . " of Section 16-112. (IIEC reply comments at 5, citing 220 ILCS 5/16-112(a))

IIEC says the proper interpretation of the Act must reflect both the Act's plain language and the General Assembly's intent. (*Id.*, citing *Illinois Power Co. v. Mahin*, 72 Ill.2d 189, 381 N.E.2d 222 (Ill. 1978)) IIEC claims that the legislature did not mean that the MVI tariff in question contain language or provisions to "prepare for some probable or possible" determination of market value for the years in question at some time in the future. IIEC contends that ComEd's tariffs (and the IP and Ameren tariffs) fail to comply with Section 16-112(a) and thus, contrary to the position of ComEd, the NFF process cannot be terminated under Section 16-112(m). (IIEC reply comments at 5)

According to IIEC, ComEd also argues that competition and "rate payers" will not be harmed as a result of the elimination of the NFF process. IIEC says it has identified potential harm to "customers" who wish to retain the option for long term multi-year transition charge contracts and PPO contracts in its original comments. IIEC also states that ComEd's statements about the lack of harm to competition and the lack of harm to ratepayers are not supported by Affidavit, nor verification of ComEd's comments. (IIEC reply comments at 5-6)

IIEC also argues that ComEd's statement that there is "no harm to competition", even if true, is irrelevant to the Commission's obligations and duties under the Act. The Commission, IIEC says, is solely a creature of statute and derives its powers and authorities from the Act and any act or order of the Commission beyond the scope of the Act is void. (IIEC reply comments at 6, citing *Illinois Bell Telephone Co. v. Illinois Commerce Commission*, 203 Ill.App.3d 424, 561 N.E.2d 426, 436 (2nd Dist. 1990)) IIEC contends that the Commission cannot abandon the responsibility imposed upon it by the General Assembly. IIEC says that in the case of *Citizens Utility Board v. Illinois Commerce Commission*, 275 Ill.App.3d 329, 655 N.E.2d 961 (1st Dist. 1995), the Appellate Court reversed a decision of the Commission approving a competitive rate filed by ComEd, because the rate violated certain provisions of the Act. The Commission, IIEC argues, cannot abandon a process mandated by Section 16-112 simply because it "will not harm competition" to do so. (IIEC reply comments at 6)

IIEC says MidAmerican recommends that the NFF process be continued until a final order is issued approving the MVI tariffs in Dockets 00-0259, 00-0395, and 00-0461 consolidated. IIEC agrees with MidAmerican that the NFF process should be continued, but disagrees that it should be discontinued in the event a final and uncontested order is entered in the subject dockets. (IIEC reply comments at 6)

IIEC says that MidAmerican recognizes that Section 16-112(d) provides the NFF with authority to calculate market values for multi-year periods. According to IIEC, MidAmerican states that the NFF is not required to make such a calculation and that the NFF process "may not" be useful in providing market values for future years. IIEC says it agrees with MidAmerican that Section 16-112(d) gives the NFF authority to determine

market values for multi-year periods. IIEC disagrees with MidAmerican's conclusion that the NFF process can be discontinued because it "may not" be useful in providing market values for future years. IIEC argues that Section 16-112 clearly provides that the NFF process is to be continued in the event that the tariffs establishing market value on the basis of an exchange or market traded index, etc., failed to "establish" a market value for each of the subject years. (IIEC reply comments at 6-7)

IIEC says that IP's comments are similar to those of Ameren and ComEd and that its replies to Ameren and ComEd are equally responsive to IP's comments. (IIEC reply comments at 6)

Subject to certain conditions and qualifications, the hearing examiner's proposed order concluded that the NFF process should be discontinued for a period of two years, and thus would not be used to produce market values for the calendar years 2002 and 2003. In its brief on exceptions, IIEC asserts that despite the desire of some parties to eliminate the NFF process, the Commission cannot do so at this time. IIEC argues that issues of convenience, frustration and opinions about the accuracy of and the desirability of the NFF process cannot drive the Commission's determination on this issue, which must be driven by the law. (IIEC brief on exceptions at 3)

IIEC claims that while the Commission is empowered under certain circumstances, pursuant to Section 16-112(m) of the Act, to terminate the NFF process, Section 16-112(m) is not the only portion of Section 16-112 or the Act which the Commission must consider in arriving at its conclusion in this proceeding. (Id.)

According to IIEC, it is consistent with law, logic and common sense that the only way a tariff can incorporate NFF values is if there is a NFF process in place to provide those values. IIEC claims that the only circumstance under which the Commission could ignore the "express direction" of Section 16-112(a) is one in which the market index tariffs clearly establish market values for the years specified in subparagraphs (b) through (h) of Section 16-112. IIEC contends that because the proposed MVI tariffs do not establish values for each of those years, the Commission cannot eliminate the NFF process under Section 16-112(m). IIEC argues that if the Commission discontinues the NFF process under these circumstances, the language of Section 16-112(a)(ii) would be meaningless. (Id. at 4)

IIEC also argues that to eliminate the NFF process would render meaningless the provisions of Section 16-112(n) and Section 16-110(b) which IIEC says provides customers with the option to secure long term transition charge contracts and long term power purchase option contracts. According to IIEC, the fact that the NFF process has not, to date, produced such values is not determinative. IIEC claims that the statutory language in question contemplates that the NFF process may not produce such values each time the process is implemented. What the statute does contemplate, IIEC asserts, is that the process will remain in place in order to ensure that there is a possibility such values can be determined and incorporated in the appropriate tariff so that customers may exercise their statutory rights. (Id.)

IIEC further argues the Commission is obligated to read all of the provisions of the Act so as to give each part thereof the meaning and the effectiveness intended by the General Assembly. In this case, when Section 16-112 is read in its entirety, together with other provisions of the Act such as Section 16-110, and given the circumstances described above, IIEC believes it is not appropriate for the Commission to terminate the NFF process at this time. (Id. at 4-5)

Ameren, ComEd and Staff filed replies to IIEC's exceptions. In its reply brief on exceptions, Ameren says that IIEC assumes there is some statutory right on the part of customers to purchase electricity at a fixed price for future periods. Ameren claims that Section 16-112 creates no such right and, to the contrary, that Section expressly provides that a utility may submit a tariff "that provides for a determination of the market value for electric power and energy as a function of an exchange traded or other market traded index, options or futures contract or contracts . . . ." (Ameren reply brief on exceptions at 1, citing 220 ILCS 5/16-112) Ameren concludes that the Act expressly contemplates that market value can be stated in terms of a relationship, and not as a fixed dollar value going forward. Ameren argues that the statute allows the market value under a utility's tariff to change as the value of power and energy in the market changes. (Ameren reply brief on exceptions at 1-2)

In its reply brief on exceptions, ComEd disagrees with the assertion of IIEC that the Commission cannot terminate the NFF process because the utilities' MVI tariffs do not provide multi-year values, for the reasons stated in the hearing examiner's proposed order and in ComEd's prior pleadings. (ComEd reply brief on exceptions at 3, citing ComEd comments at 7 and ComEd reply comments at 4-6)

In its reply brief on exceptions, Staff indicates that it disagrees with IIEC's construction of Article XVI and claims that the flaws in IIEC's arguments were previously pointed out by Staff. (Staff reply brief on exceptions at 1-3) Staff also disagrees with IIEC's argument that the MVI tariffs fail to establish market values for the years specified in subparagraphs (b) through (h) of Section 16-112 of the Act. Staff states that the tariffs are formulaic and will cover all future periods. Staff asserts that the same formulas will continue to apply each year and the specified results will become known as the relevant variables become known. (Staff reply brief on exceptions at 3, citing Ameren comments at 3)

#### **D. The AG's Position; the AG's Exceptions and Replies thereto from ComEd and Staff**

The AG argues that because of the sunset provision in the hearing examiner's proposed order in Docket Nos. 00-0259, 00-0395 and 00-0461 (Consolidated), the issue regarding the need for the NFF is not settled. Terminating the NFF at this juncture, the AG asserts, would be imprudent. (AG reply comments at 1)

Under the suggested sunset provision, the AG says the Commission will revisit all three utilities' market value index tariffs in 2003. If, at that time, the Commission rejects the MVI tariffs, or the utilities refuse to implement any proposed modifications, the AG asserts the NFF would be required for 2003. The AG contends that regardless of whether the Commission terminates the NFF this year, it would have to reinstate the NFF by the April 30 cut-off date in 2002. Otherwise, the AG says, the Commission would not have the NFF as a viable choice in its 2003 MVI deliberations. (AG reply comments at 1-2)

The AG says that MidAmerican's, ComEd's, IP's and Ameren's Initial Comments favor terminating the NFF. According to the AG, these parties generally state that Section 16-112(m)'s requirements for NFF termination have been met. The AG says it is ComEd's position that it is "...the legislature's intent...[that the] NFF process may be terminated at the point it is no longer useful." The AG argues that the requirements for NFF termination have not been met, and determining whether or not the NFF is "useful" is premature. (AG reply comments at 2)

The AG states that that Section 16-112(m) uses the word "can" instead of "may". The AG interprets the use of "can" as indicating the Legislature's desire to give the Commission carte blanche in determining if or when it is appropriate to terminate the NFF. The AG contends that contrary to ComEd's assertion regarding legislative intent, the use of "can" implies that the Legislature does not have a preference regarding NFF termination. (AG reply comments at 2)

The AG reports that PE Services stated in its comments: "The uncertainty of the infant Illinois delivery service market, problems with the 'de-regulated' electric market in other jurisdictions such as California and the language of Section 16-112(m) allow only one result . . . . Appointing a NFF is a necessary insurance policy in case problems arise as a result of any or all of ComEd, CIPS or IP adopting a MVI." The AG says it agrees with PE Services. (AG reply comments at 2)

As previously mentioned, subject to certain conditions and qualifications, the hearing examiner's proposed order concluded that the NFF process should be discontinued for a period of two years, and thus would not be used to produce market values for the calendar years 2002 and 2003. In its brief on exceptions, the AG asserts that while the data produced by the NFF process should not be used to determine the market value applicable to delivery service customers for a period of two years, the NFF process remains necessary as a default source of market data. The AG claims that the NFF provides a necessary vantage point from which to gauge the various MVI methodologies' ability to accurately produce market values, i.e. their justness and reasonableness. It is the AG's position that the NFF process should not be used to produce market values for the calendar years 2002 and 2003, but should be used to provide an alternative market value source to evaluate the continued justness and reasonableness of the MVI tariffs. (AG brief on exceptions at 3)

In its reply brief on exceptions, ComEd argues that (1) the NFF process has been subjected to criticisms by utilities, their customers, alternative electric retail suppliers ("ARES" or "RES") and the Commission itself; (2) the NFF process utilized stale contracts; (3) the NFF process was an indeterminate "black box" that did not reflect seasonality and differences in peak and off-peak pricing; and (4) the NFF values have been widely inaccurate on a seasonal basis, discouraging customers from switching to RESs during summer months and encouraging gaming by RESs in non-summer months. Therefore, ComEd concludes that the NFF process does not provide "a viable alternate viewpoint of the proper market value" or evaluation backdrop as the AG suggested. ComEd also contends that the argument that ComEd's MVI methodology is "largely untested" is specious in light of the fact that ComEd's MVI tariff has been in effect since April 2000 and has produced higher and more accurate market values and lower transition charges than the NFF process. (ComEd reply brief on exceptions at 2)

In its reply brief on exceptions, Staff contends that the appropriate bench mark against which to measure the MVI tariffs market value is the market itself. Staff asserts that it was the market that lead the various utilities to the conclusion that MVI tariffs should replace the NFF. Staff claims that the NFF is not necessary to determine whether the MVI tariffs are resulting in reasonable market values. (Staff reply brief on exceptions at 4)

In the event its recommendation described above is not adopted, the AG offers an alternative. The AG indicates that while it is pleased that the proposed order specifically reserves the right to reinstate the NFF process, the AG cannot see how the proposed order would allow that recommendation to ever be implemented. The AG is concerned that if the Commission does not receive contract information from the utilities, it will have nothing with which to compare the statutorily required justness and reasonableness of the MVI methodology. Therefore, the AG recommends that the Commission require the utilities to provide Staff with contract summary information for the two year period the NFF process is to be discontinued in the same manner as is currently used to supply such information to the NFF. (AG brief on exceptions at 5-6)

In response to the AG proposal summarized in the preceding paragraph, ComEd asserts, in its reply brief on exceptions, that there is no authority under the Act for this alternative. ComEd also contends that under the statute, the NFF process is not limited to the collection of information regarding the utilities' energy contracts, in that information regarding the ARES' contracts is included. (ComEd reply brief on exceptions at 2-3, citing 220 ILCS 5/16-111(c)) Therefore, ComEd claims that even if the Commission were to require energy contract information to be made available to Staff, an act which ComEd says would be legally questionable, the requirement could not be made applicable to the utilities alone but, would also have to apply to ARES. (Id. at 3)

In its reply brief on exceptions, Staff says it appears that the AG wants Staff, on its own, to calculate market values just like the NFF has done in the past. Staff asserts

that the AG fails to recognize that nothing in Section 16-112 contemplates any role for the Commission in determining market values under the NFF process other than appointing the NFF under subsection (b), adopting orders setting forth requirements governing the form and content of contract summaries under subsection (c), and conducting audits under subsection (j). According to Staff, the Commission and its Staff are conspicuous by their absence from subsection (d), under which the NFF calculates market values, and subsection (h), under which the NFF publishes a final report. Staff concludes that there is no role for the Commission or its staff in the calculation or publication of market values in the NFF process. (Staff reply brief on exceptions at 4)

Staff also claims there is no set formula which the NFF applies to the data. According to Staff, the NFF "brings to bear his or her expertise as a member of a national public accounting firm and as having been on a list provided by a nationally recognized provider of neutral fact-finders, analyzing data as his or her independent professional judgment dictates." Staff asserts that it would be inappropriate for Staff to suggest that it could replicate the NFF's analysis. (Staff reply brief on exceptions at 5)

In its third exception, the AG recommends that the Commission provide for a mechanism to reinstate the NFF process for possible use in determining market values for 2004. Specifically, in order for the NFF process to be in place for possible use in 2004, the AG recommends that the utilities be required to provide, to the NFF, contract summaries prior to April 30, 2003. (AG brief on exceptions at 6-7)

In response to the AG's third exception, in its reply brief on exceptions, ComEd claims that the AG's proposed language could be interpreted as the Commission prejudging the issue of the reinstatement of the NFF process. ComEd asserts that the language of the hearing examiner's proposed order as currently drafted allows sufficient flexibility for the Commission to reinstate the NFF if necessary while not providing disincentives to market participation. (ComEd reply brief on exceptions at 3)

## **E. PE Services' Position**

PE Services asserts that it is not appropriate for the Commission to "terminate the neutral fact finder procedure for the period covered by such [MVI] tariffs." (PE Services reply comments at 2, citing 220 ILCS 5/16-112(m)) According to PE Services, one summer with one utility MVI tariff in place, and an MVI tariff being modified by the hearing examiner's proposed order in Docket 00-0259, is not enough experience to eliminate the NFF process as an insurance or fallback position. (PE Services reply comments at 2)

PE Services says that ComEd and Ameren spent most of their comments arguing in favor of eliminating the NFF process by highlighting the faults that have been revealed by experience utilizing the NFF process. PE Services asserts that Ameren's and ComEd's argument that the NFF process' shortcomings are the reason it should be eliminated unwittingly support the need for maintaining the NFF process. PE Services claims that the legislature, with input from many of the parties to this proceeding --



including ComEd, IP, and Ameren -- developed a detailed NFF procedure in Section 16-112 of the Act. PE Services contends that their intent was to develop an NFF process that could correctly approximate market value. (PE Services reply comments at 3)

ComEd and IP have developed MVIs to replace the NFF process, PE Services states. PE Services says it is significant that none of the MVI tariffs proposed in the MVI Proceeding have been market tested. Until the proposed MVI tariffs have been tested against the market, PE Services claims no one knows how accurate the resulting MVI tariffs will be or whether they will suffer from flaws. PE Services maintains that the Commission cannot force any utility to change its MVI tariff if experience shows that the MVI tariff does not accomplish its goal of approximating market value. PE Services claims that is why the Commission must leave the NFF process in place as an insurance or fallback position. (PE Services reply comments at 3)

#### **F. Staff's Position; Staff's Exceptions and Replies Thereto**

Staff says that having reviewed the initial comments filed by the parties to this proceeding, it is persuaded that if the Commission determines in this proceeding that it will terminate the NFF process for 2001 and for any subsequent years, the Commission should make clear in its order that it reserves the right to reinstate the NFF process at any future point at which it determines the process to be necessary. (Staff reply comments at 2-3)

Staff says IIEC suggests that Section 16-112(m) of the Act must be read in conjunction with Section 16-112(n) and 16-110, and that when so read, would not allow the Commission to terminate the NFF process until market value index tariffs are in place that establish market values for the lesser of five years or all remaining years in which transition charges may be implemented. Staff does not concur with this construction of Article XVI. (Staff reply comments at 3)

Staff asserts there are several flaws in IIEC's argument. Staff says that subsection (a) of Section 16-112, which creates the NFF process as an alternative to an MVI tariff, refers to the "neutral fact-finder process set forth in subsections (b) through (h) of this Section." Staff states that there is no mention of subsection (n). According to Staff, subsection (b), which is one of the subsections referred to in the subsection (a) description of the NFF process, expressly holds out the possibility that the Commission may terminate the process by its direct reference to subsection (m): "Except as provided in subsection (m) of this Section, on or before April 30, 1998, . . . ." While subsection (b) directly refers to (m), Staff says there are no references to subsection (n) at any point in subsections (b) through (h). This, coupled with the opening clause of subsection (n), "To the extent the summaries list a sufficient number of actual contracts to represent a viable market and market values can be determined for more than one year", leads Staff to conclude that the subsection (n) provisions under which customers may enter into contracts which set the market value to be used in the customer's transition charge are not so much a mandate restricting the Commission's subsection

(m) authority as a statement that if contract summaries continue to be prepared, and if such summaries list sufficient contracts to represent a viable market, and if market values can be determined for more than a year, then the electric utilities must offer customers the subsection (n) contracts. (Staff reply comments at 4)

In its reply comments, Staff also says the Commission could exercise its discretion and terminate the NFF process. If the Commission determines in this proceeding that it will terminate the NFF process for 2001 and for any subsequent years, Staff suggests that the Commission should make clear in its order that it reserves the right to reinstate the NFF process at any future point at which it determines the process to be necessary. (Staff reply comments at 5)

Staff agrees with ComEd that if MVI tariffs similar to what the Commission is currently considering in the MVI Proceeding are implemented by each of the three largest electric utilities, there will in fact be a tariff for each of these utilities that, by its terms, will cover each succeeding period into the future, and unless terminated by order of the Commission or by proposed electric utility action approved or passed to file by the Commission, these tariffs may (barring the operation of a sunset clause) last until transition charges are no longer collected. (Staff reply comments at 3)

In its brief on exceptions, Staff raises an issue related to the application of Section 16-112(m) in a scenario which Staff indicates is not likely, but could conceivably occur. According to Staff, it is conceivable that the three electric utilities with more than 300,000 customers (ComEd, IP and AmerenCIPS) could implement tariffs reflecting modifications proposed by the Commission in the MVI proceeding, while the only other electric utility whose tariffs currently reflect transition charges (AmerenUE) did not. Staff recommends that this possibility be addressed in an additional Ordering Paragraph requiring that a proceeding be initiated to determine whether the Commission should order AmerenUE to adopt an MVI tariff similar to that filed by ComEd, IP, and AmerenCIPS, in the event AmerenUE does not otherwise do so. (Staff brief on exceptions at 1-4)

#### **IV. COMMISSION CONCLUSIONS**

As explained in the Order initiating this docket, the purpose of this proceeding is to determine whether to terminate the neutral fact-finder procedure pursuant to Section 16-112(m) of the Act. That same Order contemplates entry of a final order by April 30, 2001.

Section 16-112(m) of the Act provides, in part, that the Commission "may approve or reject, or propose modifications to, any tariff providing for the determination of market value that has been proposed by an electric utility pursuant to subsection (a) of this Section, but shall not have the power to otherwise order the electric utility to implement a modified tariff or to place into effect any tariff for the determination of market value other than one incorporating the neutral fact-finder procedure set forth in this Section." Section 16-112(m) further states, "Provided, however, that if each electric

utility serving at least 300,000 customers has placed into effect a tariff that provides for a determination of market value as a function of an exchange traded or other market traded index, options or futures contract or contracts, then the Commission can require any other electric utilities to file such a tariff, and can terminate the neutral fact-finder procedure for the periods covered by such tariffs."

Section 16-112(a), which is referenced in Section 16-112(m), provides in part, "The market value . . . shall be determined in accordance with either (i) a tariff that ... provides for a determination of the market value for electric power and energy as a function of an exchange traded or other market traded index, options or futures contract or contracts applicable to the market in which the utility sells, and the customers in its service area buy, electric power and energy, or (ii) in the event no such tariff has been placed into effect for the electric utility, or in the event such tariff does not establish market values for each of the years specified in the neutral fact-finder process described in subsections (b) through (h) of this Section, a tariff incorporating the market values resulting from the neutral fact-finder process set forth in subsections (b) through (h) of this Section."

Section 16-112(d) provides in part, "The neutral fact-finder shall calculate the market values for the next year and, to the extent the summaries include a sufficient number of actual contracts to represent a viable market for the sale and delivery of electric power and energy in subsequent years, for each of the 4 succeeding years."

As noted in the Order initiating this docket, the Commission ~~is currently was at that time~~ considering proposals by ComEd, IP and AmerenCIPS in Dockets 00-0259/00-0395/00-0461 (cons.) which incorporate a market value index, and one possible outcome of the MVI Proceeding ~~is that is was~~ that "each electric utility that imposes transition charges [would place] into effect a tariff that provides for a determination of market value as a function of an index." (Initiating Order at 2) Thus, the Commission initiated this proceeding in Docket 01-0053 "to determine whether to terminate the neutral fact-finder procedure pursuant to Section 16-112(m) of the Act."

The positions of the parties are summarized in Sections II and III above, and will not be repeated in detail here. Generally speaking, ComEd, IP, Ameren, and MidAmerican favor elimination of the NFF. So does Staff, as long as the order makes it clear that the Commission reserves the right to reinstate the NFF process at any future point at which it determines the process to be necessary. ComEd claims, and Staff concurs, that the utilities' MVI proposals do in fact provide for the determination of market values for each of the years contemplated under Section 16-112. Ameren agrees, asserting that the MVI tariffs will cover all future periods, in that the MVI formulas will continue to apply and the specific results will become known as values for the relevant variables become known. ComEd and Ameren also contend that the NFF process has not been able to produce market values for future years, and that there is no indication it will be able to do so. ComEd, IP and Ameren also argue that the NFF process has been cumbersome, time consuming and costly; has relied on outdated data; and has produced inaccurate, seasonally insensitive market values.

Some parties contend that the NFF process should not be terminated or discontinued for any period. IIEC argues that under Section 16-112(a), the NFF process must continue in place unless the MVI tariffs specifically establish market values for “each of the years”. IIEC says the utilities’ MVI tariffs do not establish multi-year market values, and therefore customers will not be able to sign multi-year contracts under Section 16-112(n) unless the NFF is available. IIEC also notes that a sunset provision has been proposed in the MVI Proceeding, and suggests that depending upon the length of any sunset, it will be necessary to have the NFF process in place to provide a viable alternative to the market based index tariffs in the event they are not reapproved by the Commission.

In its original comments, the AG recommended that the Commission consider retaining the NFF, regardless of whether it approves, or the utilities accept, a market index tariff. According to the AG, the NFF is the default methodology for determining the market value for customer transition charges and the power purchase option, and in the event the Commission imposes a sunset provision in its MVI order, the Commission will again have a choice between the utilities’ MVI tariffs and the NFF.

In its brief on exceptions, the AG asserts that while the data produced by the NFF process should not be used to determine the market value applicable to delivery service customers for a period of two years, the NFF process remains necessary as a default source of market data.

In its exceptions, the AG also proposed that in the event the NFF process is suspended, the Commission should require the utilities to provide Staff with contract summary information for the two year period the NFF process is to be discontinued in the same manner as is currently used to supply such information to the NFF. Staff and ComEd contend, and the Commission agrees, that this alternative should not be adopted.

PE Services contends that while either option -- to continue or terminate the NFF -- is within the Commission’s purview, the Commission should not terminate the NFF process because it is a necessary insurance policy in case problems arise as a result of any or all of ComEd, Ameren or IP adopting an MVI tariff.

The Commission has reviewed the positions of the parties. First, as noted by several parties and disputed by none, even assuming there are no other barriers to eliminating the NFF process, the Commission may not terminate the NFF process pursuant to Section 16-112(m) unless ComEd, IP, AmerenUE and AmerenCIPS all elect to file Commission-approved MVI tariffs reflecting the modifications proposed by the Commission in the MVI Proceeding. ~~Therefore, any determinations made in this order to eliminate or discontinue the NFF process must be subject to the condition that all such MVI tariff filings are in fact made.~~ The Commission observes that a final order was entered in Docket Nos. 00-0259/0395/0461 (Consolidated) on April 11, 2001, and that

ComEd, IP, AmerenUE and AmerenCIPS all filed MVI tariffs reflecting the modifications proposed by the Commission in that order.

Next, before further analyzing the issues, the Commission wishes to observe that reaching a decision in this case is a difficult proposition. In making this observation, the Commission notes that the parties' arguments on both sides of the issue were well presented, and further, that the applicable provisions of Section 16-112 are somewhat complicated, especially when read together. In any event, upon consideration of the positions of the parties, and upon consideration of the provisions of Sections 16-112(m) and 16-112(a) and other relevant sections of the statute, the Commission finds, subject to certain conditions and qualifications, that the NFF process should be discontinued for a period of two years pursuant to Section 16-112(m) which authorizes the Commission, under certain circumstances, to terminate the NFF procedure for the periods covered by MVI tariffs. As noted by some parties in the instant proceeding, this two-year period would be consistent with the "sunset" provisions ~~recommended~~adopted in the MVI Proceeding, under which the approved MVI tariffs would cease to be effective no later than the conclusion of the customer's May 2004 billing period. Thus, the NFF process (which in 2000 produced MVs for the 2001 calendar year) will not be used to produce market values for the calendar years 2002 and 2003, subject to the conditions and qualifications discussed elsewhere.

As for the provisions in Section 16-112(a), the Commission finds that the MVI tariffs in question are in fact designed to produce market values for each of the two years for which the NFF process will be discontinued. While the MVI tariffs will not determine specific market values at this time for any outyears, as well articulated by IIEC in its comments, other parties have commented that the NFF process has not been able to produce multi-year MVs. Therefore, it appears that the only situation in which the NFF process could possibly offer Section 16-112(a) outyear options not provided under the MVI tariffs would be if the NFF process would somehow become able to produce specific and accurate up-front future year values at some point during the next two years when the MVI process was unable to do so; however, there is little indication the NFF process will be capable of producing such values now or in the near future, or for that matter any sooner than market index-based tariffs will. Further, it appears that much of the interest in implementing MVI tariffs is attributable to the many criticisms of the NFF procedures and results; therefore, to assume the NFF process will be able to produce accurate future year values seems questionable. Under these circumstances, to retain the NFF process would not seem to be cost effective or otherwise warranted, and the Commission does not believe such a determination is mandated by the statute.

As noted in Sections II and III above, certain arguments were made regarding the provisions of Section 16-112(n). It appears the arguments made by IIEC were offered as part of its basic position concerning the requirements of Section 16-112(a). The Commission's conclusions regarding Section 16-112(a) issues are set forth above, and they also apply to arguments involving Section 16-112(n) and other sections of the statute cited by parties in support of their respective positions relating to Section 16-112(a).

As noted above, Staff urges the Commission to reserve the right to reinstate the NFF process at any future point at which the Commission determines such action to be necessary. The Commission fully concurs in this recommendation. On a somewhat related point, in the event IIEC or some other party gains information during the next two years suggesting that the NFF process can in fact produce accurate outyear values, and should be considered for reinstatement for this or other reasons, that party may seek such relief as is appropriate.

## V. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record herein, is of the opinion and finds that:

- (1) the subject matter and parties are within the proper scope of the Commission's jurisdictional authority;
- (2) the facts recited and conclusions reached in the prefatory of this order above are hereby adopted as findings of fact and/or law;
- (3) the NFF process should be discontinued for a period of two years, subject to the conditions and qualifications set forth herein.

IT IS THEREFORE ORDERED that the NFF process shall be discontinued for a period of two years pursuant to Section 16-112(m) of the Act, and thus shall not be used to produce market values for calendar years 2002 and 2003, subject to the conditions and qualifications set forth below and in Section IV of this order hereinabove.

~~IT IS FURTHER ORDERED that the action taken in the first ordering paragraph above is subject to the condition that an order in Dockets 00-0259/00-0395/00-0461 (cons.) authorizing ComEd, IP, AmerenUE and AmerenCIPS to file MVI tariffs is entered by the Commission; that ComEd, IP, AmerenUE and AmerenCIPS all do in fact file MVI tariffs incorporating all modifications proposed in that order; and that said order in the MVI Proceeding contains a sunset provision substantially similar to that described above.~~

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

By ~~proposed~~ order of the ~~Hearing Examiner~~Commission this ~~17th~~25th day of April, 2001.

Chairman